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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner.

vs.

LIBERTY LOAN CORPORATION, A DELAWARE CORPORATION, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK AND DAVID S. NERAD,

Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION.

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For the convenience of this Court, counsel for five of the respondents have joined in this one brief.

Said respondents respectfully submit that the decision of the Court of Appeals here challenged has not decided any important state question in a way in conflict with applicable state law, that its decision is not such as to call for the exercise of this Court's power of supervision and that petitioner has completely failed to demonstrate any special or important reason why this Court should allow the writ.

THE QUESTIONS PRESENTED FOR REVIEW BY PETITIONER.

The "questions" presented by the petitioner do not fairly arise from the opinion of the Court of Appeals or the facts in this record.

The Court of Appeals did not interpret Rule 52(a) of the Federal Rules of Civil Procedure as requiring it to affirm because there was no conflict as to any evidentiary fact.

The remaining "questions" petitioner presents for review are slanted factual queries that completely ignore the facts in this case as found by the trial court, which findings are not challenged here by petitioner and were not challenged in the Court of Appeals.

RESTATEMENT OF THE CASE.

The omissions and inaccuracies in petitioner's Statement of the Case necessitate the following restatement of material facts found by the trial court.

Liberty Loan Corporation (hereinafter called "Liberty") was organized in 1932. In 1954, it had outstanding both Class A and Class B common stock, approximately a half million Class A shares and 7500 Class B shares (Fdg. 3, Apx. 42). Its charter vested in the Class B shareholders the right to elect a majority of its Board of Directors and all other voting power (Fdg. 5, Apx. 43). More than half of these Class B shares were owned by the respondent I. H. Levy and his wife and through such ownership they controlled Liberty (Fdg. 6, Apx. 43).

Prior to July 19, 1954, Levy had negotiations with various companies concerning the sale of these shares. One prospective purchaser was willing to pay $1,700,000.00, another, $1,800,000.00. In the early part of 1954 negotiations were conducted by a third corporation and Levy for an exchange of the Class B shares which would have resulted in the Class B shareholders receiving the equivalent in shares of over $1,500,000.00, without any income tax being payable by them on the transaction. These and other negotiations tended to establish a market price for the Class B shares in a range from $1,500,000.00 to $1,800,000.00 (Fdg. 7, Apx. 43-44).

The respondent I. H. Levy was the founder and chief executive officer of Liberty. In 1954, he was reaching an advanced age (Fdg. 8, Apx. 44). The management of Liberty then lacked depth of adequate personnel and Liberty was beginning to decline in business volume and earnings, in contrast to the continued and increased growth of its

competitors (Fdg. 39, Apx. 56). Levy was concerned about attracting and retaining excellent management for Liberty but the chief impediment was the control vested in the Class B shares, which rendered the tenure of such management insecure (Fdg. 8, Apx. 44).

The respondent Lichtenstein was generally regarded as one of the top executives in the small loan field and Levy sought to have him join Liberty (Fdgs. 9, 10, Apx. 44-45). A group of investors organized Key Finance Company (not a party to this action) and on July 19, 1954, purchased the 7,241 Class B shares of Liberty owned by I. H. Levy and members of his family (Fdgs. 13, 14, Apx. 46). The "purchase was consummated at arm's length" (Fdg. 12, Apx. 45-46) and was made unconditionally and without any commitment or agreement by anyone that the Class B shares would be reclassified or exchanged for any other stock of Liberty (Fdg. 14, Apx. 46-47).

Upon the sale of such Class B shares to Key Finance Company, four of the directors resigned and four new directors, including Lichtenstein and two other executives he brought to Liberty, were elected to fill the vacancies on the seven man board (Fdg. 15, Apx. 47). On July 26, 1954, the new board, among other things, unanimously adopted an Employees' Stock Purchase Plan providing for the purchase by key employees of shares of Class A stock of Liberty (Fdgs. 15, 16, 17, Apx. 47). Both the Plan itself and the resolution of the directors adopting it provided that it be submitted to the stockholders and rescinded unless approved by a majority of each class of the then outstanding stock (Fdg. 21, Apx. 49).

Each employee participating in this Stock Purchase Plan was required to execute an unconditional written agreement to purchase a certain number of shares on an installment basis and such shares were assessable and restricted as to dividends and liquidation rights until fully paid for

and were non-transferable until thirty days after that time. No employee purchaser could accelerate any instalment under the Stock Purchase Plan until Liberty had net earnings for a six-months period amounting to 90¢ a share on all of its outstanding stock (Fdgs. 18, 19, 20, Apx. 48). The stipulated price of $17.00 per share was reasonably related to the then market value of fully paid and unrestricted shares of Liberty's Class A stock and to the latter's then book value of $16.45 (Fdgs. 18, 19, 20, 24, Apx. 48-49).

The petitioner made no proof that the action of the Board of Directors in voting the adoption of the Employees' Stock Purchase Plan, in recommending it to the stockholders, in allocating shares to employees under the Plan or in fixing the price for such shares was not in good faith or in any way fraudulent or unfair (Fdg. 25, Apx. 50). The directors adopted the Plan in order to attract and keep new management for Liberty, and, more specifically, the new management headed by respondent Lichtenstein, to encourage executive and other employees to invest in Liberty and to furnish greater incentives for outstanding services to the corporation (Fdg. 22, Apx. 49).

Full information as to this Employees' Stock Purchase Plan was given to all stockholders of Liberty, in a clear and understandable manner, by the proxy statement dated September 21, 1954, which accompanied the formal notice calling a stockholders' meeting for November 3, 1954, to vote on the Plan. There were no misrepresentations and no omission of any material fact in the proxy statement (Fdg. 34, Apx. 53-54).

At the stockholders meeting on November 3, 1954, 382,740 shares of the Class A common stock, present in person or by proxy, which was 86.2% of all the Class A stock (excluding stock sold pursuant to the Employees Stock Purchase Plan which did not vote) voted in favor

of the Employees Stock Purchase Plan, and 98.8% of the Class B stock did likewise. Only 3.5% of the Class A and none of the Class B stock voted against it (Fdg. 35, Apx. 54).

At the July 20, 1954 meeting of the directors of Liberty, they had also authorized the president to enter into an agreement for the merger of two other small loan companies with Liberty. As of September 1, 1954, Liberty and these two other companies entered into a formal Plan and Agreement of Merger effective only upon adoption by the stockholders of the three companies involved, and Liberty's directors approved and authorized its submission to all stockholders (Fdg. 26, Apx. 50-51).

This proposed Merger provided, among other things, for a reclassification of the 7500 shares of the Class B common stock of Liberty into 100,000 shares of common stock of the surviving corporation, Liberty, thus eliminating the voting control which had been vested in the Class B stock. This action was necessary to attract, keep and build up top-flight management and key personnel for Liberty. Full information as to said proposed Merger and reclassification was presented in a clear and understandable manner in the proxy statement which was sent to all stockholders and there were no misrepresentations of any kind and no omission of any material fact (Fdgs. 28, 29, 33, 34, Apx. 51-54).

It was provided in the Plan of Merger that the 100,000 shares of common stock of the surviving corporation exchanged for the Class B common stock of Liberty would be restricted as to dividends, each share being entitled to only 7½% of the dividends declared and paid on other shares of common stock until for a period of six months the consolidated net income of Liberty (as the surviving corporation) and its subsidiaries was not less than 90¢ per share on all fully paid shares, plus a proportionate amount applicable to all partially paid and assessable

shares. No such restrictions were imposed on the old Class A shares or upon those issuable to the stockholders of the two merging companies (Fdg. 32, Apx. 53).

The reclassification of the 7500 shares of Class B into 100,000 of the new common was not fraudulent, and the rate of exchange, based on the price Key Finance Company paid the I. H. Levy family group for their Class B stock, was reasonably related to the market price and book value of the Class A shares during the period preceding the purchase (Fdgs. 30, 31, Apx. 52-53).

The Merger, including the reclassification of the Class B stock into 100,000 shares of new common, was overwhelmingly approved by the shareholders on November 3, 1954. 90.7% of all of Liberty's shares entitled to vote, voted for and less than 1% voted against it (Fdg. 35, Apx. 54).

Full information concerning the solicitation by security dealers of proxies in favor of the Merger was given to the stockholders in the proxy statement, including the amount of the dealers' fees. The payment of such fees was not fraudulent, unreasonable or improper (Fdg. 37, Apx. 55). There is no evidence that the vote cast by any stockholder in favor of the Merger was in any way affected by or the result of the payment of fees or compensation to any soliciting dealer, or that the vote of any stockholder was cast other than as the result of his or her free and independent best judgment. The form of proxy provided for voting for or against the Merger. All proxies received were voted in accordance with the instructions of the stockholders (Fdg. 38, Apx. 55).

With the entry of the Lichtenstein executive management, the salaries of the old officers, including I. H. Levy, were reduced to such an extent that Liberty was able to pay the salaries of its new top management personnel without increasing the total cost of executive salaries (Fdg. 41, Apx. 56). The compensation paid to I. H. Levy, H. H.

Levy and Louis Strilky, the old management group, under the new regime, was compensation for services actually rendered by them and was "not part of the purchase price of the Class B shares sold to Key Finance Company by J. H. Levy" and his family group. The two Levys and Strilky rendered substantial services in their respective positions (Fdg. 42, Apx. 56-57).

Under the new management headed by Lichtenstein, and following the adoption of the Employees Stock Purchase Plan and the Merger with the elimination of voting control in the Class B shares, Liberty has enjoyed considerable growth. Its business volume has increased more than 75%, its bank credit $9,000,000.00. The scope and size of the operations have so expanded that it has moved from thirtieth to tenth place in the industry. Its earnings are 50% higher than they have ever been. While the entire industry in which Liberty competes has increased some 26%, Liberty has increased about 67%. The public market value of its stock has increased more than 50% (Fdgs. 43-46, Apx. 57-58).

The plaintiff's 25 shares of Class A stock were acquired by one of her attorneys of record in the trial court (but not here) (Fdg. 2, Apx. 41). Said attorney had been apprised by his stock broker on September 1, 1954, that there was going to be a Liberty merger and the Class B stock of Liberty eliminated (Aplee. Apx. 7-8) and the terms of the proposed Merger, reclassification of the Class B stock into 100,000 shares of new common and Employees' Stock Purchase Plan were described in Moody's issue of September 14, 1954, and in Standard & Poor's of September 13, 1954 (Fdg. 36, Apx. 54-55). Three days later, on September 16, 1954, plaintiff's 25 shares of stock were ordered. Her certificate is dated October 18, 1954 and, although petitioner resided in Iowa, the instant suit was filed in Chicago, Illinois, on October 20, 1954, two days later (Fdgs. 1, 2, 36, Apx. 41-52, 54-55).

ARGUMENT.

The Employees' Stock Purchase Plan.

Petitioner is completely mistaken in her assertion that the Court of Appeals has decided an important state question in connection with the Employees' Stock Purchase Plan in a way in conflict with applicable Delaware law.

Petitioner's contention is that because the fixed price of new shares issued under said Plan was below the market price of Liberty's previously issued Class A shares and the participating employees entered into no employment contracts or "non-compete" agreements, Liberty received no consideration for such spread, and the difference therefore constituted a gift of corporate assets which such participants should be compelled to repay.

The **first** fallacy in petitioner's contention is that the new shares issued under the Employees' Stock Purchase Plan and the previously issued Class A shares were not comparable.

The previously issued Class A shares were fully paid and non-assessable, were freely assignable and transferable, could be sold at any time on the open market, or otherwise, and carried no restriction as to dividends or liquidation rights. On the other hand, the new shares issued under the Employees' Stock Purchase Plan were issued as partially paid and assessable shares, could only receive dividends and only had liquidation rights in proportion to the amount paid in upon such shares, and were not assignable nor transferable for 30 days after they had become fully paid and non-assessable by virtue of the completion of the installment requirements specified in the Plan (Fdgs. 18, 19, Apx. 48).

The installment provisions of the Plan and the employees' purchase agreement required that the employee purchaser's first payment be applied proportionately on all shares purchased. The second year and succeeding yearly installment payments were applied to the payment of the balance due on as many shares as such payments would cover. No employee purchaser could accelerate any installment under the Stock Purchase Plan (and thereby secure fully paid, full dividend and fully marketable shares) until Liberty had net earnings for a 6-months' period amounting to 90¢ a share on all of its outstanding stock (Fdgs. 18, 19, 20, Apx. 48).

In view of these restrictions on the new shares issued under the Employees' Stock Purchase Plan, it is futile for petitioner to argue that the value of those shares should be measured by the market price on July 20, 1954, of the wholly unrestricted, full dividend, freely assignable and transferable Class A shares previously issued.

The second fallacy in petitioner's contention is her reliance upon decisions holding that, where the employee enters into no contract of employment or "non-compete" agreement, the granting of an "*option*" to him to purchase the corporation's stock is invalid because no consideration has passed to the corporation. Such cases are not pertinent here because, in them, although the employee, if it later proves favorable to him, *can* exercise his "option" to purchase, he is not *required* to do so and thus, in the absence of a contract of employment or non-compete agreement, no consideration at all has passed to the corporation for the granting of the option. In the case at bar, on the contrary, the Plan was strictly a "*purchase*" and not an "*option*" plan and each participating employee entered into a firm and unconditional undertaking with Liberty to purchase a fixed number of its shares on an installment plan at a fixed price, *regardless* of whether the market

price of its stock went up or down, and this valuable consideration passed immediately to the corporation.

Furthermore, in adopting said Employees' Stock Purchase Plan, the directors expressly provided that it would be rescinded unless approved by a majority of each class of the corporation's outstanding stock (Fdg. 21, Apx. 49) and, at the November 3, 1954 meeting, 86.2% of the Class A stock (excluding shares issued under the Plan, which did not vote on the proposition) and 98.2% of the Class B stock voted in favor of said Plan and only 3.5% of the Class A and none of the Class B stock voted against it (Fdg. 35, Apx. 54).

Under Delaware law, where a majority of the shareholders approve or ratify any action taken by directors in which some or all of the directors are personally interested, the burden of proof is upon an objecting stockholder to establish that no person of ordinarily sound business judgment would be expected to consider the transaction fair (*Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57 (1952); *Gropper* v. *North Central Texas Oil Company*, 114 A. 2d 231 (Del. Ch. 1955); *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 91 A. 2d 786, 790; *Schiff* v. *RKO Pictures Corp.*, 104 A. 2d 267, 271). Even in *Kerbs* v. *California Eastern Airways, Inc.*, 33 Del. Ch. 69, 90 A. 2d 652, relied upon by the petitioner, the court expressly recognizes the foregoing rule in remanding that case to determine whether the profit-sharing plan there involved had been ratified by a majority of the stock.

The overwhelming approval by the shareholders of Liberty of the Employees' Stock Purchase Plan, under Delaware law, imposed upon the petitioner the burden of proving that *no person* of ordinarily sound business judgment would be expected to consider $17.00 per share a fair price for shares issued under the Plan. Petitioner made no such proof, and she does not contend that she did. She stood

solely upon a mistaken assumption that the price of the new shares issued under the Plan (subject to all the restrictions and limitations provided therein) should have been the same as the market price, on the date the merger was approved by the Board of Directors, of the unrestricted Class A shares previously issued and to remain outstanding. Petitioner cannot now expect this Court to assume that all of the shareholders of Liberty who voted approval of the Plan were wanting in ordinarily sound business judgment.

Reclassification of the Class B Shares.

The conversion of the 7500 Class B shares into 100,000 shares of the new common stock of Liberty was not a gift by Liberty of 92,500 shares as petitioner contends, but a lawful reclassification of stock by the shareholders of Liberty pursuant to the provisions of the applicable Delaware statute governing corporate mergers. Under that statute the reclassification was effected by the shareholders, not the directors (Del. Code Anno., Title 8, § 251).

Petitioner blandly assumes that the Class B shares should have been exchanged for the new common on a share-per-share basis, and that therefore, since the B shareholders received 100,000 shares, 92,500 shares were issued without any consideration passing to Liberty. Petitioner's assumption ignores the established value of the control vested in the Class B shares and the many advantages to the Class A shareholders of the merger which were pointed out and time has confirmed.

Delaware law recognizes the distinctive and substantial value of voting control. In *Porges* v. *Vadsco Sales Corporation*, 21 Del. Ch. 127, 32 A. 2d 148, where holders of the old common stock, which had no book value at all and would have received nothing upon a liquidation, but held voting

control, received stock valued at some $719,000 in the new corporation resulting from the merger, the court, in refusing to enjoin the proposed merger, said, p. 151:

> "To arrive at a judgment of the fairness of the merger, all of its terms must be considered. Complainant focuses his attention exclusively on the resultant changes in book value without taking into account other consequences of the merger with respect to the rights conferred by the two classes of stock. Complainant ignores the important fact that the old common stockholders have voting control, and that by the merger, control would pass to the holders of the old preferred stock. * * *."

In *Bailey* v. *Tubize Rayon Corporation*, 56 F. Supp. 418, the Delaware U. S. District Court had before it the claim that a plan involving reclassification of shares was so unfair as to be fraudulent because the old common stock holding voting control was "under water" to the amount of $12.96 per share yet received new stock of a value of $14.14 per share. The court refused to interfere with the reclassification, saying, p. 425:

> "* * * The important thing is that the Common Stock, as such, gave up its voting control; that is the thing of value. *Cf. Maddock et al.* v. *Vorclone Corp.*, 17 Del. Ch. 39, 43, 147 A. 255, 256."

Answering the complaint of a plaintiff stockholder that the Class B stock with voting control received better treatment in a reclassification than it should have, the U. S. District Court in Delaware said, in *MacCrone* v. *American Capital Corporation*, 51 F. Supp. 462, 469:

> "* * * But, what is more important in weighing the allocation of the Class B Common Stock of Pacific is that this stock, at present has voting control of that company. * * *"

The Court of Appeals for the 3rd Cir. in *Hottenstein* v. *York Ice Machinery Corporation*, 136 F. 2d 944, passed

upon a reclassification of shares between preferred and common stockholders. The court found that the equity in the corporation was about $4,300,000.00, and the accumulated dividends alone on the preferred stock amounted to approximately $4,600,000.00 (p. 945). The prior claims of the preferred stockholders totaled $10,647,090.00, representing the par value of the preferred plus the cumulative dividends accrued thereon (p. 946). The plan of recapitalization, effected through a merger, resulted in giving the common stockholders 17% of the stock of the surviving corporation. In the reclassification, the voting power of the holders of the preferred was increased from 24.8% to 83.2%. The Court of Appeals, in upholding the dismissal of the complaint by the trial court, said that under all the circumstances of the case the reclassification was fair.

By reason of the foregoing authorities, it is established that under Delaware law voting control is a very valuable right, and the courts will not interfere with a reclassification which gives the holders of voting control a substantial equity in the corporation for its surrender, even though prior to the reclassification they had no equity in the corporate assets.

In the *instant* case, the holders of the Class B with absolute voting control surrendered it for about one-seventh of the total shares of Liberty issued pursuant to the merger and one-seventh of the vote. Moreover, unlike the facts in the Delaware cases where the consideration given for surrender of voting control was upheld, the Class B shareholders in this case not only had an equity in the corporate assets before the exchange but a market value had been established for the Class B shares, and Key Finance Company exchanged its Class B shares in the reclassification for the equivalent of what it had paid the Levy family group for them.

Furthermore, the 100,000 shares of the common stock of

the surviving corporation exchanged for the Class B common stock of Liberty were restricted as to dividends, each share being entitled to only 7½% of the dividends declared and payable on other shares of such common stock until for a period of six months the consolidated net income of Liberty (as the surviving corporation) and its subsidiaries was not less than 90¢ per share on all fully paid shares, plus a proportionate amount applicable to all partially paid and assessable shares. No such dividend restrictions were imposed on the old Class A shares or upon those issuable to the stockholders of the two merging companies (Fdg. 32, Apx. 53).

The net effect of such restriction was to limit the dividends on the 100,000 shares received in exchange for the former Class B common stock to the same dividends the holders of such stock would have received if they had continued to own their Class B common stock until such time as the established earnings of the Company for a six month period should have been not less than 90¢ per share on all fully paid shares of common stock outstanding (including the additional 100,000 shares of common stock), which would reasonably insure the continuation of payment of the pre-existing annual dividend of $1.50 per share on all outstanding common stock (Fdg. 20, 32; Apx. 49, 53).

Where, as in this case, the reclassification is a part of a merger, the Delaware statute requires that two-thirds of all of the shares of Liberty, Class A and Class B, voting together, vote affirmatively (Del. Code Anno., Title 8, Secs. 251(c), 252(c)). Here the two-thirds requirement was far exceeded; the affirmative vote being over 90% (Fdg. 35, Apx. 54).

It is well settled under Delaware law that where the required majorities take action under appropriate statutory provisions to reclassify or rearrange stockholders' rights, a

presumption arises in favor of the action taken and its good faith, and the dissenting stockholder has the burden of proving that such action was either actually fraudulent or so unfair as to amount to constructive fraud. The federal courts have consistently found this to be the rule in Delaware and have enforced it:

In *Barrett* v. *Denver Tramway Corporation*, 53 F. Supp. 198 (D. C., Del. 1943) aff'd 146 F. 2d 701, the court said, p. 201:

> "* * * where required statutory majorities have the right to take action looking to reclassification or rearrangement of stockholders' rights, a presumption arises of bona fides of purpose with a resultant burden on dissidents to prove that the action is so palpably unfair as to amount to a constructive fraud * * *."

The foregoing rule is repeated in substantially the same language in *MacCrone* v. *American Capital Corporation*, 51 F. Supp. 462 (D. C., Del. 1943).

In *Bailey* v. *Tubize Rayon Corporation*, 56 F. Supp. 418 (D. C., Del. 1944), the court said, p. 422:

> "Under the Delaware decisional and statutory law an amendment (*reclassification of shares*) will not be condemned unless it is so unfair as to amount to constructive fraud.
>
> "* * * Unless the act of the majority of the directors and stockholders is so palpably unfair as to afford no basis for a difference of opinion among reasonable men, the court should not substitute its judgment for that of the stockholders and directors * * *" (Parenthetical comment ours.)

The rule is reiterated in *Porges* v. *Vadsco Sales Corporation*, 27 Del. Ch. 127, 32 A. 2d 148; *Coles* v. *National Cash Credit Association*, 18 Del. Ch. 47, 156 A. 183, and *MacFarlane* v. *North American Cement Corporation*, 16 Del. Ch. 172, 157 A. 396. In the latter case, the court said, p. 400:

"In the absence of any evidence of fraud, bad faith or intentional wrongdoing, there must be a presumption that those favoring the merger are acting honestly, according to their best judgment and for each of the companies that seek to consolidate.

"If the consolidation proposed is unfair to a stockholder but not so grossly unfair as to warrant injunctive relief, he is not without remedy. Under Section 61 of the General Corporation Law (as amended by March 2, 1927, 35 Del. Laws, c. 85) any stockholder who objected to the merger may demand of the new company, and require it to pay him, the fair value of his stock as of the date of the consolidation."

The petitioner in this case could have had that relief, and a quick profit on her stock purchase. She chose instead this expensive lawsuit despite the fact that she owns but 25 shares of Liberty stock, purchased after the merger had been approved by the Board and publicly announced.

In the trial court petitioner offered no proof that the action of Liberty's Board of Directors in approving the Merger, including the reclassification of the Class B shares, and recommending and submitting it to the vote of the stockholders, was not taken in good faith or was in any way fraudulent (Fdg. 27, Apx. 51). Such action was necessary to attract and keep competent officers and key personnel (Fig. 29, Apx. 52) because the chief impediment to attracting top-flight management for Liberty had long been the fact that the vesting of all control in the Class B shares rendered the tenure of any such management insecure (Fdg. 8, Apx. 44). As a consequence, prior to the sale to Key Finance Company, the growth of Liberty had ceased and it had entered into a period of decline and was losing position in the industry in which it was engaged (Fdg. 39, Apx. 56).

The proxy statement which all the shareholders had before they voted not only gave full information as to the

reclassification of the 7500 shares of Class B into 100,000 shares of the new common (Fdg. 34, Apx. 53-54), but it also set forth on a *pro forma* basis the effect the reclassification would have upon the book value of the Class A, as well as the Class B, expressed in dollar figures per share, and the effect the reclassification would have on earnings available for dividends, likewise expressed in dollar figures per share (Fdg. 33, Apx. 53). There were no misrepresentations of any kind in the proxy statement and there was no omission of any material fact and 90.7% of all the shares entitled to vote voted in favor of the reclassification. Less than 1% voted against it (Fdgs. 34, 35, Apx. 53-54).

That the shareholders exhibited good business judgment in voting in favor of the merger is amply demonstrated by the tremendous growth and increased earnings of Liberty and the sustained advance of over 50% in the market value of its shares, which we have previously pointed out in our Restatement of the Case (Fdg. 43, 44, 45, 46, Apx. 57-58).

Petitioner's Charges Against Lichtenstein and I. H. Levy.

Petitioner also asserts that the respondents Lichtenstein and I. H. Levy should personally be held liable on the ground that they violated their fiduciary duties in connection with the transactions here involved.

Petitioner's statement (p. 18) that "the only way that the 7500 B shares can equal the value of the 100,000 shares is if the power of control inherent in the 7500 shares is misused to appropriate more than the fair share of corporate property to the owners of those shares" is but a slightly veiled charge that Levy and his family sold their Class B stock to Key Finance Company knowing that the purchaser intended to misuse the power of control that went

with it, and is apparently made in the hope that this Court will accept it as a factual foundation for the application of the rule laid down in *Perlman* v. *Feldman*, 219 F. 2d 173, and other cases cited at page 19 of her petition. Those cases hold that one with voting control who sells his controlling shares, knowing that the purchaser will abuse the control thus obtained to enrich himself unjustly at the expense of the corporation, is liable for the excessive consideration which the purchaser pays. The petitioner neither adduced, nor attempted to adduce, any evidence whatever that I. H. Levy had any knowledge that Key Finance Company intended to abuse the control attached to the Class B shares or that Key Finance intended to or did in fact abuse that control. The evidence is altogether to the contrary (Fdgs. 25, 27, 47, Apx. 50, 51, 58).

Petitioner's insinuation of intended abuse of control is particularly obnoxious because Key Finance Company surrendered, in exchange for its proportion of the 100,000 shares of new common, the 7241 shares of Class B which it had purchased from the Levy family group and, with such surrender, the voting control of Liberty passed to *all* of its shareholders. How, then, could Key misuse the power of control? If petitioner means to infer that the power was misused for but one thrust—to get the 100,000 shares, petitioner is grossly mistaken. The voting control in the Class B shares did not and could not, under Delaware law, effect their exchange for the 100,000 shares of the new stock because, under the Delaware Statute governing mergers, the exchange had to be and was accomplished by the affirmative vote of two-thirds of the Class A and Class B shares of Liberty, voting together as one class (Del. Code Anno., Title 8, Secs. 251(c), 252(c)). If Key Finance Company *had* sought to abuse the power of control, it *could* have moved for a reclassification *without* or *before* a merger. *Without* a merger! only a bare majority, rather than two-

thirds, would have been necessary to effect the reclassification.

Furthermore, the market price of the Class B stock during the four years prior to the sale by the Levy family group to Key Finance Company has been established as within a range of $1,500,000.00 to $1,800,000.00 (Fdg. 7, Apx. 43-44). Key paid $1,700,000.00 for the Class B shares it purchased from the Levy group and it later exchanged those shares for the approximate equivalent of what it had paid for them (Fdgs. 14, 31, Apx. 46, 52).

As the trial court found, it does not appear from the evidence that any of the defendants entered into a scheme to defraud the former Class A stockholders or Liberty itself; or that any of the defendants, singly or in concert, committed any fraud against the Class A stockholders or Liberty (Fdg. 47, Apx. 58). The cases cited by petitioner at page 18 of her petition do not involve transactions comparable to those that petitioner here attacks. Even though respondents Lichtenstein and Levy were fiduciaries during the course of the transactions, the burden was on petitioner, as an objecting stockholder, to prove the transactions were so unfair that no person of ordinarily sound business judgment would consider them to be fair—because the majority of the stockholders, an overwhelming majority, approved the transactions (*Gottlieb* v. *Heyden Chemical Corp.*, 33 Del. Ch. 177, 91 A. 2d 57 (1952); *Gropper* v. *North Central Texas Oil Company*, 114 A. 2d 231 (Del. Ch. 1955); *Kerbs* v. *California Eastern Airways*, 33 Del. Ch. 69, 90 A. 2d 652 (1952); *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 91 A. 2d 786, 790 (1952); *Schiff* v. *RKO Pictures Corp.*, 104 A. 2d 267, 271 (Del. Ch. 1954)). The petitioner did not even *attempt* to prove what the Delaware law required of her to sustain her complaint.

The overwhelming majority of the stockholders approved what the petitioner condemns. The trial court found that

full information as to the Employees' Stock Purchase Plan and the reclassification of the B shares for 100,000 shares of the new common of Liberty was given to all stockholders, in a clear and understandable manner by the proxy statement and that there were no misrepresentations and no omission of any material fact in the proxy statement (Fdg. 34, Apx. 53).

The Court of Appeals Did Not Neglect or Ignore the Legal Issues Involved.

Petitioner repeatedly asserts (pp. 2, 19, 20, 21) that, in its decision, the Court of Appeals interpreted Rule 52(a) of the Rules of Civil Procedure as requiring it to affirm the judgment below on the sole ground that the appellant had not challenged the propriety of any of the Findings of Fact made by the trial court, without considering the legal principles applicable to the facts so found, and completely ignored and failed to consider such legal principles (pp. 3, 4, 14, 18, 19, 20, 21). This criticism is unfounded and unjust.

While it is true that, in its opinion, referring to Rule 52(a), the Court of Appeals does point out that the Findings of Fact made by the court below were not challenged by the appellant, it states that, "*after our study of this record* and the parties' briefs, we leave those findings undisturbed." The Court of Appeals further *held* that the Propositions of Law Relied Upon by Krantman were

> "simply generalizations of law without bearing on the facts reported by the trial judge"

and affirmed on the ground that

> "the trial judge correctly, we think, granted defendants' motion to dismiss under Rule 41(b), Federal Rules of Civil Procedure;"

which rule, as this Court well knows, authorizes the trial court, upon motion made at the close of the plaintiff's case, to enter judgment for the defendant where, as here,

> "upon the facts *and the law* the plaintiff has shown no right to relief." (Emphasis added.)

As we have already pointed out, the petitioner's so-called legal propositions and the cases cited in their support had and still have no application whatsoever to the facts of the instant case and, in reaching its decision affirming the trial court, the Court of Appeals did not ignore but on the contrary followed and applied well established Delaware law, which petitioner concedes to be controlling.

The petitioner is not an "old line" Class A stockholder of Liberty. She became one *after* the transactions she attacks were under way and had been publicly announced. The terms of the merger, including the reclassification of the B stock into 100,000 shares common and the Employees' Stock Purchase Plan, were described in Moody's issue of September 11, 1954, and in Standard & Poor's of September 13, 1954 (Fdg. 36, Apx. 54-55). Her twenty-five (25) shares of stock were ordered for her by one of her attorneys of record in the trial court on September 16, 1954, after he had been apprised by his broker that there was going to be a Liberty merger and its B stock eliminated (Fdg. 2, Apx. 41, Appellee's Apx. 7-8). Her certificate for the 25 shares is dated October 18, 1954, and, although she resided in Iowa, this suit was filed in the Federal Court at Chicago, on October 20, 1954, only two days later (Fdgs. 1, 2, Apx. 41-42).

CONCLUSION.

These respondents concur in petitioner's view (p. 20) that "there are cases which more urgently require the attention of the Supreme Court than this one." We respectfully submit that the decision of the Court of Appeals here challenged has not decided any important state question in a way in conflict with applicable state law, that its decision is not such as to call for the exercise of this Court's power of supervision and that petitioner has completely failed to demonstrate any special or important reason why this Court should allow the writ.

Respectfully submitted,

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